

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

MARK B. MUMLEY,
Plaintiff

V.

ROBERT HOFMANN, STUART
GLADDING, TIM SIMONEAU,
TODD BLANCHARD, VERMONT
DEPARTMENT OF CORRECTIONS
EMPLOYEES, COGNITIVE SELF
CHANGE FACILITATORS,
Defendants

FILE NO. 1:06CV137

RULING AND ORDER

Plaintiff Mark Mumley has filed several objections to the Magistrate Judge's Report and Recommendation (Paper 33). Only one of plaintiff's objections merits discussion.

The plaintiff has requested leave to proceed with this case without exhausting the prison grievance process. See Paper 33 at 3. Noting the defendants have not addressed the issue of exhaustion, the Magistrate Judge denied Mumley's motion and indicated he "may reassert his arguments if the defendants raise lack of exhaustion as a defense." Paper 33 at 4; see Ruggiero v. County of Orange, 467 F.3d 170, 178 (2d Cir. 2006) ("A prisoner's failure to exhaust also can be excused if the defendants' actions estop them from presenting the failure to exhaust as a defense, . . . or their actions render grievance procedures de facto unavailable").

Appended as an exhibit to plaintiff's objections is a letter dated October 20, 2006, addressed to the plaintiff from Commissioner Hofmann. The letter indicates, inter alia, that plaintiff's "grievance #3 pertaining to the decision to reclassify has been received and reviewed."

This Court recently noted the Vermont Department of Corrections has adopted a four-step grievance procedure, the last step of which is: "[T]he Commissioner or his designee responds to the grievance set forth in Form #3 within a reasonable amount of time." Gay v. Correctional Med. Servs., No. 1:04CV289, Ruling on Def.'s Mot. for S.J. at 3 (D. Vt. Feb. 9, 2007). The October 20, 2006 letter, which apparently was not before the Magistrate Judge, suggests some or all of plaintiff's claims have been exhausted.

Accordingly, upon review and over objection, the Report and Recommendation of the Magistrate Judge is AFFIRMED, APPROVED, and ADOPTED. See 28 U.S.C. § 636(b)(1). Plaintiff's Motion for Injunctive Relief (Paper 9), and to the extent that his Motion to Amend (Paper 18) contains a request for injunctive relief, are DENIED. That portion of the Report and Recommendation which denied Plaintiff's Motion to Proceed without Exhausting the Grievance Process (Paper 6) is remanded for reconsideration in light of the exhibits appended to plaintiff's objections (Paper 47).

It is further certified that any appeal taken from this Ruling and Order in forma pauperis would not be taken in good faith because such an appeal would be frivolous. See 28 U.S.C. § 1915(a)(3).

SO ORDERED.

Dated at Brattleboro, Vermont, this 22nd day of March, 2007.

/s/ J. Garvan Murtha
J. Garvan Murtha
United States District Judge